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THE PROBLEM OF POLICE BRUTALITY

Violent force has been used in this country by many factions to accomplish their goals. But never before has the cry, "police brutality," been heard so often in protest of the employment of violent force by the police to preserve law and order. Cries of "police brutality" have become all too common for the legal community to remain inactive.

The problem of police brutality must be viewed with reference to the function of the police and the laws that govern their use of force. The police are charged with the duty of upholding the law and, in an effort to do so, have the authority to arrest violators of law. The authority to arrest necessarily carries with it the privilege to use that force which is reasonably necessary to effect arrests or to repel resistance to an arrest.¹ The type of situation that an officer is in when he uses force, that is, arresting a felon or misdemeanor, apprehending a fleeing felon, preventing crime or repelling an attack, is determinative of the amount of force that is permitted.

This comment discusses the use and abuse of permissible force. Particularly, this comment is concerned with the victim's remedies for, and society's control of, the use of unreasonable force by the police.

PERMISSIBLE FORCE

Deadly Force

In most states the use of deadly force by a police officer is restricted to situations where such force is reasonably necessary for the officer's self-defense, to overcome resistance to an arrest or to halt a fleeing felon.² The unlawful use of deadly force renders the police officer liable, both criminally and civilly.

Recently, the wisdom of the above rules has been seriously challenged. Much of the discontent with the present law is due to the fact that the social rationale once used to support the rules is no longer applicable, because the common law distinctions between felonies and misdemeanors are no longer valid. For example, at

¹ Bowers, *Nature of the Problem of Police Brutality*, 14 CLEV.-MAR. L. REV. 601 (1965) [hereinafter cited as Bowers].

² P. TAPPAN, CRIME, JUSTICE AND CORRECTION 285 (1960) [hereinafter cited as P. TAPPAN]. But, the use of deadly force to arrest or apprehend a fleeing misdemeanor is never allowed. R. PERKINS, CRIMINAL LAW 980 (2d ed. 1969) [hereinafter cited as R. PERKINS].

common law, the commission of a felony worked an automatic forfeiture of the felon's life.³ So, the use of deadly force to apprehend a felon was permissible. Today, since few felonies are punishable by death, a man does not forfeit his life by the mere perpetration of a felony; hence deadly force can no longer be justified by the above rationale. Furthermore, scientific research has developed non-lethal methods of apprehension, such as mace, tear gas and tranquilizers, which greatly decrease the need for deadly force. Although the use of such devices often results in the cry of "police brutality," one cannot seriously contend that such devices are more brutal than death itself.

Allowing a policeman to use deadly force to apprehend a felon when he believes that it is reasonably necessary to do so is highly questionable. In some situations, particularly where the felon has taken a life, the question is not so difficult. But, where the particular felony is a property crime or the mere possession of marijuana, the question is difficult indeed.⁴ The morality of taking a life for the enforcement of property rights has been challenged by many authorities. One commentator feels that this rule is "dangerously liberal" and encourages "official slaughter."⁵ This argument gains credence when one considers that in the defense of property, the use of deadly force is never authorized.⁶ Obviously, the conclusion follows that property is not as valuable as human life.

Two arguments are lodged against the use of deadly force in general. First, the use of deadly force creates a substantial risk to innocent bystanders.⁷ Second, many authorities have pointed to in-

³ R. PERKINS, *supra* note 2, at 985.

⁴ Comment, *Kill or be Killed: Use of Deadly Force in the Riot Situation*, 56 CALIF. L. REV. 829 (1968) [hereinafter cited as *Kill or be Killed*].

⁵ P. TAPPAN, *supra* note 2, at 286. "A preliminary study of thirty police homicides . . . indicated that seven of the victims had committed either no crimes at all or only misdemeanors. In only thirteen cases did the officer see the victim commit a felony before killing him, despite the fact that the law permits a policeman to use his weapon only to protect his own or a citizen's life from immediate danger or to apprehend a person *known* to have committed a felony.

"Ten of the thirty victims were originally apprehended by the officer for misdemeanors, on vague suspicion, or for other non criminal reasons. When they fled—without attacking the officer—they were shot down. Their deaths were nothing more or less than murders, made justifiable by the decision of a coroner's jury or non-culpable by a grand jury's decision not to indict." E. CRAY, *THE BIG BLUE LINE* 157 (1967) [hereinafter cited as E. CRAY].

⁶ R. PERKINS, *supra* note 2, at 1026.

⁷ INSTITUTE OF CONTINUING LEGAL EDUCATION, *CRIMINAL LAW AND THE CONSTITUTION* 397 (1968).

More than one-hundred people were injured during the People's Park incident in Berkeley, California. San Francisco Chronicle, May 16, 1969, at 1, col. 8. The police used tear gas and bird shot to control the crowds. *Id.* at 4, col. 5. Listed among the number hospitalized were twenty-seven demonstrators and two newsmen with gunshot

appropriate police action, particularly the use of deadly force, as a cause of many of our civil disorders and racial violence.⁸ In this day of overcrowded conditions, the weight of these arguments cannot be ignored.

The Use of Deadly Force in Self-Defense

Most problems relating to the use of deadly force arise in the self-defense situation.⁹ Any person, including a police officer, may use deadly force to repel a deadly attack.¹⁰ This right obtains whether the person making an attack is a felon or a misdemeanant.¹¹ The problem which arises from the policeman's use of deadly force in self-defense is that the police may "take advantage of this right to a degree that would not be tolerated from the civilian."¹² Of course, the nature of police work requires and explains some of this tolerance.¹³ This in itself justifies the policeman's use of more force than would be allowed to the private person.

Permissible Force in California

In California permissible force is a statutory matter.¹⁴ When making an arrest, a police officer may use reasonable force to restrain, to apprehend or to overcome an individual's resistance to an arrest. He may use deadly force to apprehend or effect the arrest of

wounds. In contrast to these figures, only six officers were hospitalized, and none of them had gunshot wounds. *Id.* at 6, col. 4.

The same problem was present in the Detroit riots during the summer of 1967. "No deaths occurred during the first day of the rioting, but they mounted in the next several days as the use of firearms increased." *Kill or be Killed*, *supra* note 4, at 832.

⁸ INSTITUTE OF CONTINUING LEGAL EDUCATION, *supra* note 7, at 391.

"The police themselves, . . . are frequently responsible for the incidents which salt the wound of social discontent." E. CRAY, *supra* note 5, at 9.

⁹ R. PERKINS, *supra* note 2, at 997.

¹⁰ *People v. Mallicoat*, 27 Cal. App. 355, 149 P. 1000 (1915). Furthermore, even the jurisdictions that adhere to the "retreat rule" make a special exception for a police officer and hold that an officer need not retreat before he can use deadly force to repel a deadly attack made by a person he is lawfully arresting. R. PERKINS, *supra* note 2, at 1009.

¹¹ *People v. Hardwick*, 204 Cal. 582, 269 P. 427 (1928).

¹² P. TAPPAN, *supra* note 2, at 285.

¹³ *Id.* Police work is very dangerous and serves an important function in the society. Police are practically always armed and are usually near crime. Furthermore, assaults on police officers are quite common. So, no one can doubt that a police officer needs a greater degree of tolerance in this respect than does a private person.

¹⁴ CAL. PEN. CODE §§ 835-35a (West Supp. 1968).

Section 835 provides that "[a]n arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention."

Section 835a provides that "Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or overcome resistance."

a felon. But, in any situation: Felony, misdemeanor or otherwise, he may use deadly force to repel a deadly attack. To this end an officer may even take a life.¹⁵

REMEDIES AVAILABLE TO THE VICTIM OF A POLICE ASSAULT

Generally

Charges of police brutality may be dealt with in several ways. Some European countries have established the institution of ombudsman, a liaison between police and citizens to deal with this and other problems of governmental activity.¹⁶ This situation has been quite successful in controlling the abuse of police discretion.¹⁷ Despite its success, apparently no American jurisdiction has adopted the ombudsman approach to control police brutality.¹⁸

Some American jurisdictions have adopted the concept of police review boards to deal with the problem of police brutality and with other problems.¹⁹ Comprised of citizens from the community, these boards hear and act on complaints arising from police activities. The action that a board may take to discipline the offending officer varies in accordance with the authority vested in it. Moreover, such authority usually includes the power to suspend or demote the offending officer. Generally, the law enforcement community does not approve of police review boards and considers them an encroachment upon the traditional means of internal discipline.²⁰

"A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."

¹⁵ *People v. Hardwick*, 204 Cal. 582, 269 P. 427 (1928).

¹⁶ For example, Sweden and Denmark have long recognized the institution of ombudsman.

The ombudsman acts as a liaison between the community and its government. It is charged with the responsibility of protecting citizens from abusive governmental practices. It has no authority to award damages. Its sole function is to bring about reforms. E. CRAY, *supra* note 5, at 223-24.

¹⁷ T. AARON, *CONTROL OF POLICE DISCRETION; THE DANISH EXPERIENCE* (1966).

¹⁸ E. CRAY, *supra* note 5, at 223.

¹⁹ Two such jurisdictions are Pennsylvania and Michigan.

²⁰ Police review boards have been sharply attacked on a variety of charges, "[R]anging from uns subtle hints of a Communist conspiracy to allegations that they would destroy morale on the force." E. CRAY, *supra* note 5, at 218.

The International Association of Police Chiefs has taken a strong stand against these boards, attributing their increase in popularity to the increased interest in civil rights. *Police Review Boards*, 31 *THE POLICE CHIEF* 12 (Feb. 1964).

Civil Remedies in California

In the absence of police review boards and other similar remedies the citizen's sole form of redress is to the courts in a civil or criminal action. This is the case in California, as there are no police review boards.²¹ The basic tort remedy that can be used in California for redress of a police attack is an action for assault and battery.

The civil law of assault and battery is derived from the general personal right to be free from bodily restraint or harm, as outlined in the California Civil Code section 43.²² Under this section the courts usually assume that the Penal Code provisions for assault and battery apply, along with their judicial interpretations.²³ An assault is established by showing that the defendant's conduct led the plaintiff to a reasonable apprehension of bodily harm.²⁴ A battery is established by showing that the defendant's violence or willful, wanton or reckless disregard for the plaintiff's rights proximately caused the plaintiff's injuries.²⁵ The intent of the defendant is a relevant issue only when the injury arises from a lawful act. If the injury arises from an unlawful act, the defendant's intent is immaterial,²⁶ because such intent is inferred from the unlawful conduct.²⁷

Additionally, the courts allow exemplary damages in cases where victims have sustained injuries from an assault with a deadly weapon where there was no provocation on the victim's part.²⁸ The policy for this rule is to discourage the indiscriminate use of deadly weapons.

California Government Code section 820 provides that a public employee is liable in damages to one injured by his act or omission in the same manner as a private person.²⁹ The cases consistently

²¹ B. COOK, *THE JUDICIAL PROCESS IN CALIFORNIA* 102 (1967) [hereinafter cited as B. COOK].

This situation is not apt to change in the near future because in 1965 the Legislature killed a bill that would have authorized police review boards. *Id.*

²² CAL. CIV. CODE § 43 (West 1954) provides: "Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm. . . ."

²³ *Fraguglia v. Sala*, 17 Cal. App. 2d 738, 62 P.2d 783 (1936).

²⁴ *Lopez v. Surchia*, 112 Cal. App. 2d 314, 246 P.2d 111 (1952).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Herman v. Glasscock*, 68 Cal. App. 2d 98, 155 P.2d 912 (1945).

²⁹ CAL. GOV'T CODE § 820 (West 1966).

hold that an officer is liable under this section for injuries that are caused by his use of unreasonable force in making an arrest.³⁰

Problems of the Civil Remedy

The use of the tort sanction to control police brutality is quite rare and apparently ineffective as a deterrent.³¹ Since civil suits are instituted by the victims of police assaults, and since the lack of suits may indicate a general apathy on their part, the victims must bear some of the blame for this situation. But some of their reluctance to pursue the tort remedy can be explained by *considering the various reasons* that might lead a citizen to believe that it would be to his advantage to forego litigation. In some instances the fear of subsequent police harassment may possibly discourage victims of police assaults from litigation.³²

Furthermore, because complaints of police brutality usually arise from the arrest situation, the police often have the upper hand in any subsequent negotiations with the victim.³³ Accordingly, the decision whether to prosecute the defendant is made at the discre-

³⁰ *Scruggs v. Haynes*, 252 Cal. App. 2d 656, 60 Cal. Rptr. 355 (1967).

³¹ W. LAFAVE, *ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 413 (1965) [hereinafter cited as W. LAFAVE]. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955) [hereinafter cited as Foote].

³² W. LAFAVE, *supra* note 31, at 424.

Fear that the police "[W]ill retaliate with new charges or that the district attorney will press charges stemming from the original arrest" also deters many would-be complainants from ever filing charges. Further, "[T]he police discourage the filing of complaints by *arresting would-be complainants or by prosecuting them for filing false reports with the police department*. This quickly discourages complaints." E. CRAY, *supra* note 5, at 176.

In Washington, D.C., during 1962 "40 percent of those who reported alleged police misconduct were themselves haled into court to face misdemeanor charges of filing a false report with the police." *Id.* at 179.

³³ "Many defendants will agree not to press charges against an offending officer in exchange for the privilege of copping a plea—pleading guilty to lesser charges and receiving lighter jail or prison sentences." *Id.* at 11.

Criminal charges are often filed against the victim of a police assault for "obstruction of justice" type offenses. An example of such a charge is the case of Russell Broughton, who witnessed a police attack on a Negro youth. Upon inquiring as to the reason for the attack, he was arrested. Broughton's attorney, after conferring with the Police Court Judge advised Broughton that if he signed a release "[T]he judge would dismiss the charge placed against him.

"... According to the arresting officer, Broughton had willfully and unlawfully interfered in the arresting officer's attempt to carry out his duties" by allegedly stating, "I would like to know why all this police brutality." Broughton, on the other hand claimed that he said only, "I was kind of wondering why you are manhandling this boy."

"Broughton was charged with interfering with a police officer simply because—as the officer put it—he failed to move on when the officer told him to do so. Short of a threatened riot—and there was no unruly crowd watching the arrest—the police officer had no right to order Broughton to move on." E. CRAY, *supra* note 5, at 23-24.

tion of the district attorney,³⁴ subject to influence by the police. Under such circumstances a victim of police brutality may be quite reluctant to pursue his civil remedy. For example, the police may persuade the victim to agree to a compromise whereby the police agree to "talk to the district attorney" if the victim will withdraw his complaint.³⁵

Many factors may contribute to the motivations of the victim and the police to make such a compromise. The most obvious is the desire of the victim to avoid incarceration and the imposition of a criminal record.³⁶ On the other hand, the police have their reputation to protect and do not want the bad publicity that usually arises from a tort case against a policeman.³⁷ Hence, both parties stand to gain considerably by such a compromise.

To prevail in a civil case, the plaintiff-victim must establish his case by a preponderance of the evidence. In application, this burden of proof is often insurmountable because the plaintiff-victim often must prove his case to a jury that is likely to be more sympathetic towards the defendant-policeman than to one who appears to them to be a plaintiff-criminal.³⁸ Further, if the victim is not a

³⁴ CAL. PEN. CODE §§ 737, 807 (West 1956).

³⁵ Considering the working relationship of the police and the district attorney, it is very likely that the police have some say in the disposition of charges filed against the victim of a police assault. See note 33 *supra*, and accompanying text.

³⁶ "Frequently, too, those who might complain of deprivation of one or another of their civil liberties by the police must face criminal charges of which they are guilty. If they are at all prison-wise, they know matters will go much more smoothly and the sentence will be much less harsh if they do not complain. First offenders who do make complaints must pursue those complaints from behind bars—no easy task. They generally prefer to devote themselves to appeals of the criminal charges on which they were convicted, leaving the secondary malpractice matters as unimportant at the moment.

"Consequently, the number of formal complaints is not large, and the full extent of police malpractice is only hinted. Occasional figures compiled from court records indicate that there is far more malpractice than formal complaints represent." E. CRAY, *supra* note 5, at 180.

³⁷ W. LaFAVE, *supra* note 31, at 425.

Another interesting phenomenon comes into play here which offers further incentive to withdraw a complaint, thus preventing a civil suit from ever arising. Police associations formed by the officers themselves often maintain a fund for the purpose of settling claims lodged against their members. An adequate out-of-court settlement can usually be paid by such a fund and the cost is quite low for the individual officers in the association. This fact further defeats the deterrent effect of a civil suit against a police officer. This, coupled with the facts that the courts themselves favor out-of-court settlements in such situations, and that they are necessary in a large percentage of the cases due to the overcrowded court dockets, provides a strong inducement to accept the out-of-court settlement. *Id.* at 424-25.

³⁸ W. LaFave, *supra* note 31, at 413.

It has been pointed out that there is an "[U]nwillingness of juries to believe the word of the average citizen when a policeman contradicts him." *Kill or be Killed*, *supra* note 4, at 856.

"respectable citizen,"³⁹ the jury is quite likely to find that he did not suffer any substantial damage as a result of the particular police action.⁴⁰

Further difficulties attributable to certain police practices arise in meeting the burden of proof. The secrecy of police interrogations and the fact that the victims of police assaults are often isolated at the time of an assault, renders it difficult to sustain any amount of proof of a police assault.⁴¹ Because of this, the victim of a police assault rarely has witnesses to substantiate his claim; if he does, they will rarely speak out because of fear of retaliation;⁴² whereas the police officer usually has numerous fellow officers who "saw it all."⁴³ Moreover, the court and/or jury is more apt to believe the police when they give their account of the alleged assault or the perennial "accidental fall down the station house stairs" which occurred while "resisting arrest" and which accounted for the victim's bruises or hospitalization.⁴⁴ Furthermore, some police have employed such tactics as blinding lights, the water cure and pounding victims with soft objects such as sand filled socks and rubber hoses to avoid leaving marks on their victims.⁴⁵ Hence, even in a blatant case of police brutality, there may be little evidence, other than his own testimony, that a victim can offer to prove physical abuse at the hands of the police.

The courts themselves are not without blame for the scarcity of cases against the police involving use of unreasonable force and the general inadequacy of the remedy as a means to control police activity. As already noted, out of court settlements are encouraged by the courts.⁴⁶ Further, certain judicial attitudes evidence a judicial disinclination to intervene on behalf of a citizen in the area of police activity.⁴⁷ This disfavor, combined with the problems above, make a person's right to sue and prosecute the police a "consistently poor

"In addition, juries are unlikely to grant a verdict to a 'criminal type.'" *Id.* at 858. See also, *Footte, supra* note 31, at 504-06.

³⁹ "Yet it is the poor and the friendless who suffer the most at the hands of the police." E. CRAY, *supra* at note 5, at 175. See also, *Footte, supra* note 31, at 500.

⁴⁰ W. LAFAYE, *supra* note 31, at 423. See also, *Kill or be Killed, supra* note 4, at 858.

⁴¹ P. TAPPAN, *supra* note 2, at 292.

⁴² "Most such assaults on the streets or in the back seat of police cars are unobserved. Rare is the eyewitness . . . who doesn't fear retaliation because he spoke out; rarer still is the witness . . . who is merely an observer, unimplicated in the arrest or assault: . . ." E. CRAY, *supra* note 5, at 146.

⁴³ *Id.* at 25. See also, P. TAPPAN, *supra* note 2, at 292.

⁴⁴ P. TAPPAN, *supra* note 2, at 285. See also, E. CRAY, *supra* note 5, at 146.

⁴⁵ P. TAPPAN, *supra* note 2, at 289.

⁴⁶ *Supra* note 35.

⁴⁷ "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to

remedy."⁴⁸ Therefore, the unlawful practices of the police, such as the use of unreasonable force, continue to "pay-off" in terms of results and are pursued with impunity."⁴⁹

No matter what the cause, the scarcity of civil suits definitely generates an apathy towards the tort remedy on the part of the police.⁵⁰ This fact indicates that the tort remedy has little deterrent value relative to the use of unreasonable force by the police.⁵¹

Governmental Immunity

Although a policeman may be civilly liable for a particular tort, it does not necessarily follow that his governmental employer will also be liable.⁵² California Government Code section 815 provides that, *in the absence of another statute which imposes liability*, the public entity is not liable for an injury caused by a public employee.⁵³ Where liability is imposed on the public entity by another statute, it is subject to the same defenses that are available to a private person.⁵⁴

The California Codes are abundant with sections that *impose liability on a public entity* in certain limited situations. California Government Code section 815.2 imposes liability on the public entity for an injury proximately caused by a public employee while acting within the scope of his employment.⁵⁵ However, by operation of this section, if the offending officer is immune from liability, for example, by operation of the discretionary immunity doctrine,⁵⁶ then the public entity cannot be sued either.⁵⁷ Conversely, if the police officer is not immune from liability, then neither is the public entity.⁵⁸

the constant threat of retaliation." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). See, *White v. Towers*, 37 Cal. 2d 727, 235 P.2d 209 (1951); *Odinetz v. Budds*, 315 Mich. 512, 24 N.W.2d 193 (1946).

⁴⁸ P. TAPPAN, *supra* note 2, at 288.

⁴⁹ *Id.*

⁵⁰ W. LAFAVE, *supra* note 31, at 413.

⁵¹ *Id.* Foote, *supra* note 31, at 493.

⁵² Most American jurisdictions allow for the immunity of the public entity from liability growing out of police law enforcement activities. R. Jones & W. Mathes, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 890 (1965).

⁵³ CAL. GOV'T CODE § 815 (West 1966).

⁵⁴ *Id.*

⁵⁵ CAL. GOV'T CODE § 815.2 (West 1966).

⁵⁶ See text accompanying notes 114-15 *infra*.

⁵⁷ One author points out that in order for the tort remedy to be effective in preventing and controlling police brutality, governmental liability must be established. Foote, *supra* note 31, at 514.

⁵⁸ *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 60 Cal. Rptr. 355 (1967). See *Jones v. City of Los Angeles*, 215 Cal. App. 2d 155, 30 Cal. Rptr. 124 (1963).

Section 815.2 is particularly suited to deal with claims of police brutality arising from the riot situation where crowd control is often accomplished by faceless, badgeless blue waves.⁵⁹ In an action under this section the victim does not have to identify the offending officer whose tortious conduct is the basis for the public entity's liability. The victim need only show that he was injured by a police officer, acting in the scope of his employment, in a way that would render him personally liable.⁶⁰ The only issue in such a case would be that of the reasonableness of the force used under the circumstances. That is a jury question.

Where a public entity is immune from suit by operation of section 815, it may still have to satisfy a judgment entered against one of its police officers. California Government Code section 825 provides that if a public employee requests the public entity to defend him in an action for an injury arising from his employment and the entity complies, then the entity is compelled to "pay any judgment based thereon."⁶¹ However, for reasons hereinafter discussed, the public entity is exempt from paying any exemplary damages awarded the plaintiff.⁶² On the one hand, this statute benefits the police officer in that he does not have to pay a judgment entered against him.⁶³ However, this section tends to subvert one

⁵⁹ The Alameda County Grand Jury, in its report on the People's Park incident, noted that many of the officers involved in controlling the demonstrators were unidentifiable at the time of the riot. *San Francisco Chronicle*, Nov. 8, 1969, at 12, col. 8. Logically, this indicates that the officers were badgeless. The Grand Jury recommended that officers be identifiable at all times during a riot. *Id.*

At Massachusetts Institute of Technology, where three hundred anti-war demonstrators picketed an on-campus laboratory, they were dispersed by two-hundred helmeted police, wearing no identification. *Id.*, Nov. 6, 1969, at 13, col. 4.

⁶⁰ CAL. GOV'T CODE § 815.2 (West 1966), Legislative Committee Comment.

⁶¹ CAL. GOV'T CODE § 825 (West 1966).

This section is effective only when the public entity has tendered defense or has agreed to pay any judgment that results from the action or claim. *Id.*, Legislative Committee Comment.

⁶² CAL. GOV'T CODE § 825 (West 1966). See *Salinas v. Souza & McCue Construction Co.*, 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967); *Nellis, California Governmental Tort Liability and the Collateral Source Rule*, 9 SANTA CLARA LAW. 227 (1969).

⁶³ It should be noted that "[S]ection 995 of the Government Code makes it mandatory upon the city attorney to represent a policeman upon request in a civil action arising out of the scope of his employment" unless the public entity can lawfully refuse to assert a defense as provided "under the provisions of sections 995.2 or 995.4." *Sinclair v. Arnebergh*, 224 Cal. App. 2d 595, 598, 36 Cal. Rptr. 810, 811 (1964). See CAL. GOV'T CODE §§ 995.2, 995.4 (West 1966).

So, in most cases the police officer need not "[F]ace any requirement that he assume the financial and mental burden of defending his official conduct in a personal suit against him." *Johnson v. State*, 69 Cal. 2d 782, 797, 447 P.2d 352, 359, 73 Cal. Rptr. 240, 247 (1968). However, this must have some bearing on the lack of deterrent value discerned in the tort remedy.

purpose of a civil action, to wit: The deterrence of unsocial behavior, that is, the use of unreasonable force by a police officer. The police officer, not subject to pecuniary loss via a civil judgment against him, apparently suffers only the consequence of losing his job.⁶⁴ On the other hand, this section benefits the plaintiff who has been awarded a judgment against a police officer in that it almost guarantees him that he will receive some compensation.⁶⁵ So, even where the public entity is immune from suit,⁶⁶ it is still indirectly responsible in that it has to pay the judgment.

Sections 815.2 and 825 are subject to one important qualification. California Government Code section 818 provides that a public entity never has to pay the exemplary damages awarded against one of its employees under section 3294 of the California Civil Code.⁶⁷ This section is quite fair in that it is the logical extension of the well established legal principle that an employer is not responsible for the malicious acts of his employees.⁶⁸ Because exemplary damages are awarded by way of punishment for malicious conduct, with the hope of discouraging it, if the public entity was compelled to pay them it would be answering for the criminal acts of its police officers.⁶⁹

In summary, a person can sue the public entity for the tortious activities of its police officers committed while acting in the scope of their employment. To prevail, the plaintiff must show that the police

⁶⁴ However, the threat of losing one's job does not appear to be a formidable one, particularly in situations where the public entity tenders defense. A public entity may refuse to defend an officer when it determines that actions in question were not within the scope of his employment. CAL. GOV'T CODE § 995.2 (West 1966). So, it is doubtful that "scope of employment" is an issue in many cases. If it is an issue, the defense is probably conducted pursuant to an agreement as provided for in section 825. So, the public entity's main line of defense is the reasonableness of the officer's conduct. By defending an officer on this basis, the public entity logically excludes disciplining an officer on the basis of unreasonable conduct. This would lead one to the conclusion that the officer's job is not in jeopardy.

⁶⁵ This guarantee is quite costly to the plaintiff in that he has to "[B]e prepared to pay out, in advance, money for depositions, jury fees, investigators' costs and court filing fees. . . . Few victims of police malpractice can afford such costs. . . .

"In the meantime, the *defendant officers* can count on free legal service from the city attorney . . . necessary costs paid out of the city treasury, and the invaluable benefits of the department's (that is, fellow officers') investigations." E. CRAY, *supra* note 5, at 211.

⁶⁶ For example, application of CAL. GOV'T CODE § 844.6 (West 1966) provides, in part, that a public entity is not liable for injuries to any prisoner.

⁶⁷ CAL. GOV'T CODE § 818 (West 1966). CAL. GOV'T CODE § 3294 (West 1966) provides for the awarding of exemplary and punitive damages "where the defendant has been guilty of oppression, fraud, or malice, express or implied . . ."

⁶⁸ R. PERKINS, *supra* note 2, at 639. P. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 407 (4th ed. 1952).

⁶⁹ *Salinas v. Souza & McCue Construction Co.*, 66 Cal. 2d 217, 228, 424 P.2d 921, 926, 57 Cal. Rptr. 337, 342 (1967).

officer is, in fact, liable, and that there is no statutory provision that exempts the public entity from liability in the specific situation.

Criminal Liability in California

In addition to the civil remedies discussed above, the victim of a police assault may file charges against the offending officer for criminal assault and battery. However, the actual proceeding must be commenced by the district attorney, at his discretion, by concurring with the written complaint of the complainant.⁷⁰ So, once the charges are filed, the aggrieved citizen takes no further part in the disposition of the case, save his role as witness. Because the proceeding is against the officer as a citizen, he may assert any defense that is available to other citizens, that is, public authority,⁷¹ self-defense,⁷² defense of others,⁷³ and prevention of crime.⁷⁴

Of particular importance here are California Penal Code sections 240, 242 and 245. Section 240 defines an assault as an attempted battery.⁷⁵ Section 242 defines a battery as the unlawful use of force on another person.⁷⁶ Section 245 recognizes aggravated assault with a deadly weapon.⁷⁷ The latter requires explanation, in that convictions for assault with a deadly weapon are not restricted to cases where a deadly weapon, per se, was used. Section 245 creates two separate offenses: assault with a deadly weapon and assault by means likely to produce great bodily harm.⁷⁸ Yet, in spite of the fact that a deadly weapon per se is not used, convictions of police officers under section 245 are minimal.

⁷⁰ See note 34 *supra* and accompanying text.

⁷¹ R. PERKINS, *supra* note 2, at 978.

⁷² *Id.* at 995.

⁷³ *Id.* at 1021.

⁷⁴ *Id.* at 990.

⁷⁵ CAL. PEN. CODE § 240 (West 1955). "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

⁷⁶ *Id.* § 242 "A battery is the willful and unlawful use of force or violence upon the person of another."

⁷⁷ *Id.* § 245 "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by means of force likely to produce great bodily harm is punishable. . . ."

One should note that in a prosecution under this section, the prosecutor need not prove a specific intent to commit an assault with a deadly weapon to make his case. *People v. Wright*, 258 Cal. App. 2d 762, 765, 66 Cal. Rptr. 95, 98 (1968).

⁷⁸ *Gonns v. United States*, 231 F.2d 907 (10th Cir. 1956).

In California, various weapons presently used by the police have been classified as deadly weapons. A pistol used in that capacity is a deadly weapon. *People v. Pearson*, 150 Cal. App. 2d 811, 311 P.2d 142 (1957). A police officer's billy club and a pistol used as a club in an attack on an officer are deadly weapons. *People v. Crossland*, 111 Cal. App. 2d 831, 245 P.2d 380 (1952). A blackjack used to knock a person to the ground is also a deadly weapon. *People v. Duncan*, 72 Cal. App. 2d 423, 164 P.2d 665 (1945). Or, the offense may be committed by beating with hand or fist, kicking, choking or "other comparable means." *Gonns v. United States*, *supra*.

Penal Code section 149 provides that an assault or a beating administered by a police officer without lawful necessity is a crime.⁷⁹ Enacted in 1872 and amended to alter the punishment provisions, this statute would appear to have an influential effect on the control of police brutality. But its infrequent use is illustrative of the fact that this is not the case.⁸⁰

Problems of the Criminal Remedy

The four sections of the California Penal Code discussed above, numbers 149, 240, 242 and 245, are particularly relevant to the problem of police brutality since they make the remedy of criminal prosecution available to the victim who has been assailed in accordance with their provisions. Although police activity often encompasses various elements of the crimes mentioned above, the cases against police officers under these sections are minimal.⁸¹ This situation casts serious doubt on the role that criminal prosecution has in controlling police activity. Perhaps it is indicative of the general ineffectiveness of the Penal Code as a citizen's remedy for police assault.⁸²

As noted above, once the complaining citizen files his complaint, the course of the proceedings against a police officer is determined by the district attorney.⁸³ This creates an awkward situation in that "policemen and prosecutors do not punish themselves."⁸⁴

⁷⁹ CAL. PEN. CODE § 149 (West Supp. 1968). "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable. . . ."

⁸⁰ Section 149 has been cited only four times since 1947: *In re Riddle*, 57 Cal. 2d 848, 852, 372 P.2d 304, 305, 22 Cal. Rptr. 472, 473 (1962) (dictum); *People v. Rhone*, 267 Cal. App. 2d 652, 656, 73 Cal. Rptr. 463, 465 (1968) (refusal to hear evidence relative to section 149 as it was presented by way of a hypothetical); *Ne Casek v. City of Los Angeles*, 233 Cal. App. 2d 131, 137, 43 Cal. Rptr. 294, 298 (1965) (dictum); and *People v. Lantz*, 120 Cal. App. 2d 787, 792, 262 P.2d 19, 22 (1953) (denying a section 149 instruction).

⁸¹ For instance, not one criminal action was commenced against a policeman in all of Los Angeles County from 1950 to 1967. B. COOK, *supra* note 21, at 103. "[S]tate criminal prosecutions against offending officers are rare, and convictions rarer still." E. CRAY, *supra* note 5, at 211. In a multi-state study, "[N]o instance of criminal prosecution against a police officer was noted, and police did not voice any concern over the threat of criminal prosecution." W. LAFAYE, *supra* note 31, at 426. Perhaps the lack of concern was caused by the lack of prosecutions? No matter how one resolves this question, the fact remains that the citizen's remedy of prosecution does little, if anything, to control police brutality. Foote, *supra* note 31, at 493.

⁸² Apparently the inadequacies of this remedy have been experienced throughout the world. W. LAFAYE, *supra* note 31, at 426 n.73, citing Commission on Human Rights, *Study on the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile*, U.N. Doc. E/CN. 4/813, at 209 (1961).

⁸³ *Supra* note 34.

⁸⁴ Foote, *supra* note 31, at 493.

"I should like to have brought to my attention any such case where a prosecution

But, this is precisely the predicament that the police and the district attorney are in when a case is prosecuted by information. Furthermore, the process of prosecution by information raises a "quasi-conflict-of-interest" problem in that most of the time the police and the district attorney are allied in the battle against crime. The district attorney depends upon the police for evidence to make a case against a criminal.⁸⁵ If the district attorney partook in frequent prosecutions of police officers on charges of brutality, animosity could certainly develop. This would tend to break down the working relationship between the two government departments. Hence, both parties stand to benefit if the cases of police brutality are few. The scarcity of cases on this matter lends support to this contention.

In summary, the citizen's resort to the courts to impose criminal liability on the police apparently offers little help in controlling police brutality or in aiding him in his dealings with the police.

Prisoners, a Special Situation

Often the cry of "police brutality" echoes off the prison walls. Rightfully so, as prisoners are not without rights under the law. A conviction and sentence does not work a forfeiture of a man's right to be protected by the law.⁸⁶ A prison guard, like a police officer, is subject to the same criminal and civil sanctions as any other citizen. Furthermore, California has several statutes which purport to strictly regulate and control the use of force in the prisons. Outlining several special offenses that are similar to assault and battery, these statutes apply to those who have prisoners in their custody.

California Penal Code section 2650 provides that any injury to the person of a prisoner that is not authorized by law is punishable in the same manner as if the person were not a prisoner.⁸⁷ This section provides a sanction against *anyone* who injures a prisoner, and is the logical extension of a guard's duty to protect prisoners in his custody. Hence, if a prison guard unlawfully beats a prisoner, he will be criminally liable under the appropriate section of the Penal Code by operation of section 2650.

has been successful, or even where a prosecution has been instituted. It is absurd to suggest that any district attorney, or superior officer, is going to take criminal action against one of his subordinates. . . ." *White v. Towers*, 37 Cal. 2d 727, 737, 235 P.2d 209, 215-16 (1951) (dissenting opinion).

⁸⁵ "The most serious problems with regard to criminal actions are the reluctance both of the district attorney to prosecute actions against members of a police department with which he must work in daily close cooperation, and of the police to testify against each other." *Kill or be Killed*, *supra* note 4, at 856. See also E. CRAY, *supra* note 5, at 209.

⁸⁶ CAL. PEN. CODE § 2650 (West 1956).

⁸⁷ *Id.*

In an attempt to further control the use of force in prisons, California Penal Code section 2651 provides that a prisoner shall be subjected only to that punishment which is authorized by the Director of Corrections and administered under the direction of the warden.⁸⁸ Arguably, this section should have some prominence in the field of police brutality. However, the cases citing this statute do not bear out this assumption.⁸⁹

California Penal Code sections 673 and 2652 prohibit the use of cruel, corporal or unusual punishment in any correctional institution.⁹⁰ Violation of either of these statutes is a misdemeanor.⁹¹ To convict a person under these sections, the prosecution must prove that the person inflicted "cruel, inhuman or excessive punishment" on a prisoner in violation of his fundamental and basic rights.⁹² As used in these sections the word "cruel" means: Disposed to give pain to others, willing or pleased to hurt or afflict.⁹³ However, the definition of cruel and unusual punishment is a changing concept "to be judged in light of developing civilization."⁹⁴ With this in mind, and in light of the various charges lodged against the police and their prison counterparts relative to their cruel practices,⁹⁵ one would expect to find numerous cases arising under any statute dealing with cruel and unusual punishment. But, very few cases have been decided under these sections.⁹⁶

⁸⁸ CAL. PEN. CODE § 2651 (West 1956).

⁸⁹ Only two cases were found: *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962). *In re Ferguson*, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 754 (1961) (question of warden's authority to limit the practice of the Muslim religion in prison).

⁹⁰ CAL. PEN. CODE §§ 673, 2652 (West 1956).

⁹¹ *Id.*

⁹² *In re Riddle*, 57 Cal. 2d 848, 852, 372 P.2d 304, 306, 22 Cal. Rptr. 472, 474 (1962).

⁹³ *People v. McCaughan*, 49 Cal. 2d 409, 317 P.2d 974 (1957).

⁹⁴ *Austin v. Harris*, 226 F. Supp. 304, 307-08 (W.D. Mo. 1964).

⁹⁵ A recent Alameda County Grand Jury report, November 7, 1969, which discusses the various problems relating to the People's Park incident, *supra* note 7, "[C]riticized the 'lack of supervision' of the Alameda County Sheriff's deputies at Santa Rita Rehabilitation Farm and called for misdemeanor complaints against two unidentified deputies at the prison farm." San Francisco Chronicle, Nov. 8, 1969, at 12, col. 1.

"Demonstrators taken to Santa Rita . . . had complained that they were subjected to brutality and harassment by their guards." *Id.* col. 3. For an interesting, though probably prejudicial account of the events that gave rise to these complaints see RAMPARTS, Aug., 1969, at 50.

⁹⁶ *People v. McMillan*, 45 Cal. App. 2d 821, 825, 114 P.2d 440, 442, (1941) (held that section 2652 makes unlawful "the use of any corporal punishment . . . no matter how moderate or reasonable the amount of force used for punishment."). *O'Brien v. Olson*, 42 Cal. App. 2d 449, 109 P.2d 8 (1941) (citing section 2652 held that the use of a rubber hose by a prison guard to suppress a riot or to prevent a prisoner from injuring a guard or fellow prisoner is not prohibited by this section). See also *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962) (citing

Other California statutes, Penal Code sections 147 and 2653, provide for a fine and removal from office of anyone who is guilty of "willful inhumanity or oppression towards a prisoner in his custody."⁹⁷ For the reasons discussed above, one would expect that these sections would have some influence on the control of police brutality. However, only two cases have been found which cited these sections and neither of them fulfill this expectation.⁹⁸

The best remedy that a prisoner has is to file for a writ of habeas corpus as provided by California Penal Code sections 1473-1506.⁹⁹ This remedy is not limited to the procurement of release by one unlawfully imprisoned. The writ is granted under exceptional circumstances to review matters that cannot otherwise be reached.¹⁰⁰ The scope of habeas corpus encompasses the protection of the rights of prisoners while incarcerated.¹⁰¹ It has been used to examine allegations by prisoners that they have been beaten by guards.¹⁰² To be entitled to relief by this writ, the petitioner must allege and prove that cruel and unusual punishment was inflicted upon him in violation of his fundamental and basic rights.¹⁰³ This remedy is perhaps the most effective remedy available to the prisoner and is used quite often.¹⁰⁴

Problems of the Prisoner's Remedies

Possibly one reason that cases under the above sections, with the exception of the habeas corpus provisions, are so rare is the very nature of a prisoner's confinement. Although a prisoner can probably file criminal charges against a prison guard,¹⁰⁵ one can imagine the repercussions that a prisoner might suffer at the hands of other guards should he choose to do so. To speculate, these

both sections); *In re Ferguson*, 55 Cal. 2d 665, 361 P.2d 417, 12 Cal. Rptr. 755 (1961) (citing both sections); *Fernelius v. Pierce*, 22 Cal. 2d 226, 138 P.2d 12 (1943) (citing section 2652); *Ex parte Brown*, 68 Cal. 176, 8 P. 829 (1895) (citing Penal Code section 681, which is the source of section 2652).

⁹⁷ CAL. PEN. CODE §§ 147, 2653 (West 1956).

⁹⁸ *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962); *People v. Lisenba*, 14 Cal. 2d 403, 89 P.2d 39 (1939) (citing Penal Code section 147, which is the source of section 2653).

⁹⁹ CAL. PEN. CODE §§ 1473-506 (West 1956).

¹⁰⁰ *In re Jackson*, 61 Cal. 2d 500, 393 P.2d 420, 39 Cal. Rptr. 220 (1964).

¹⁰¹ "The California courts have used the writ not only to test jurisdiction, but also to protect the fundamental basic rights of prisoners." *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304, 305, 22 Cal. Rptr. 472, 473 (1962).

¹⁰² *In re Cathey*, 55 Cal. 2d 679, 391 P.2d 426, 12 Cal. Rptr. 762 (1961).

¹⁰³ *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962).

¹⁰⁴ The existence and frequent use of the writ of habeas corpus by prisoners is indicative of the otherwise remediless nature of imprisonment.

¹⁰⁵ At least there are no statutes denying the prisoner this right. The federal courts allow a prisoner to file charges against guards with the United States Attorney. *Dixon v. Maryland*, 261 F. Supp. 746 (D. Md. 1966).

repercussions could very well be a dominant reason for the lack of suits filed by prisoners. The scarcity of cases can also be attributed, in part, to the special relationship existing between the district attorney and prison officials which is somewhat analogous to the relationship between the district attorney and the police.¹⁰⁶ Further, judicial disfavor toward intervening on behalf of prisoners enters into the picture.¹⁰⁷

The civil remedy for prisoners is almost meaningless in California due to the concept of civil death.¹⁰⁸ California Penal Code section 2600 provides that any term of imprisonment suspends the civil rights of the person so incarcerated.¹⁰⁹ Hence, the prisoner cannot maintain a civil action in a state court during the term of his imprisonment.¹¹⁰ But, civil death does not prevent a prisoner from filing a civil action under the Federal Civil Rights Act.¹¹¹

By application of section 2600 the prisoner is not allowed to maintain a civil action while imprisoned, but he still has a cause of action. His imprisonment tolls the running of the statute of limitations, and the cause of action survives the term of incarceration.¹¹² Therefore, the prisoner can bring an action for injuries arising out of his imprisonment when he becomes a member of free society. However, by the time he is able to bring an action, it is often too late.¹¹³ Consequently, during the period of incarceration, the prisoner must rely on habeas corpus to protect himself.

¹⁰⁶ See note 85 *supra* and accompanying text.

¹⁰⁷ *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472, (1962).

"The courts are and should be reluctant to interfere with or to hamper the discipline and control that must exist in a prison. Petitions containing such charges must be carefully scrutinized and the facts carefully weighed with the thought in mind that they are frequently filed by prisoners who are keen and ready, on the slightest pretext, or none at all, to harass and annoy the prison officials and to weaken their power and control. These prisoners include many violent and unscrupulous men who are ever alert to set law and order at defiance within or without the prison walls." *Id.* at 852, 372 P.2d at 306, 22 Cal. Rptr. at 474. *cf. supra* note 47.

¹⁰⁸ For an excellent discussion of this concept, see Comment, *Public Entity Immunity from Tort Claims by Prisoners*, 19 *HAST. L.J.* 573 (1968).

"Where conviction is followed by imprisonment, the chances that the potential plaintiff will be able to prosecute his action are slim indeed. In about one-third of the jurisdictions the doctrine of civil death suspends the right to sue during the duration of imprisonment, which usually includes any time spent on parole." Foote, *supra* note 31, at 507.

¹⁰⁹ CAL. PEN. CODE § 2600 (West 1956).

¹¹⁰ *McCollum v. Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955). See Foote, *supra* note 31, at 507.

¹¹¹ *McCollum v. Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955).

¹¹² CAL. CODE CIV. PROC. § 352 (West 1954); *Weller v. Dickson*, 314 F.2d 598 (9th Cir. 1963).

¹¹³ "Potential plaintiffs who are in prison, therefore, usually must wait until they are released to get their tort remedy. In the meantime . . . [T]he cause of action and its supporting evidence may grow stale. . . ." Foote, *supra* note 31, at 508.

POLICE DEFENSES

In a suit against a public employee, including a police officer, the employee is entitled to assert the same defenses as a private person.¹¹⁴ Furthermore a police officer may assert that he is duty bound to keep his prisoner under control and that he used no more force than was reasonably necessary to fulfill his duty.¹¹⁵

Additionally, California Government Code section 820.2 provides the basis of the discretionary immunity doctrine.¹¹⁶ At a glance, this section would appear to protect an officer from liability arising out of his use of unreasonable force. But the doctrine of discretionary immunity does not automatically apply to protect a police officer from every error in judgment.¹¹⁷ A police officer cannot invoke the doctrine of discretionary immunity against a claim that he used unreasonable force in making an arrest. In fact, the cases consistently hold that the doctrine is not available to him in such a case and that he is liable for the use of unreasonable force.¹¹⁸

Further, Chapter Three of the California Tort Claims Act of 1963 entitled "Police and Correctional Activities" lists six specific situations where an officer is immune from liability.¹¹⁹ None of these sections extends immunity to an officer for the use of unreasonable force in effecting an arrest, and it has been held that such an extension cannot be made.¹²⁰

California Government Code section 820.4 states that an officer is not liable for an injury arising from an act or omission occurring while "exercising due care, in the enforcement of any law."¹²¹ However, the use of unreasonable force could hardly be deemed an "exercise of due care." So apparently this section can-

¹¹⁴ CAL. GOV'T CODE § 820 (West 1966).

¹¹⁵ Bowers, *supra* note 1, at 603.

¹¹⁶ CAL. GOV'T CODE § 820.2 (West 1966).

¹¹⁷ *Scruggs v. Haynes*, 252 Cal. App. 2d 656, 60 Cal. Rptr. 355 (1967).

¹¹⁸ *Id.*; *Jones v. City of Los Angeles*, 215 Cal. App. 2d 155, 30 Cal. Rptr. 124 (1963); *Boyle v. Evans*, 14 Cal. App. 2d 472, 58 P.2d 922 (1936). *See*, *Appier v. Hayes*, 51 Cal. App. 2d 111, 124 P.2d 125 (1942).

¹¹⁹ The six situations where an officer is specifically immune from liability are: Where he fails to provide police protection. CAL. GOV'T CODE § 845 (West 1966). Where he fails to provide prison, jail or correctional facilities. *Id.* § 845.2. Where he interferes with the right of a prisoner to a judicial determination or review of the legality of the prisoner's confinement. *Id.* § 845.4. Where he fails to furnish or obtain medical care for a prisoner. *Id.* § 845.6. Where he determines whether to parole or release a prisoner or one escapes from him and injures a third party in so doing. *Id.* § 845.8. Where he fails to make an arrest or retain an arrestee in custody. *Id.* § 846.

¹²⁰ *Scruggs v. Haynes*, 252 Cal. App. 2d 256, 60 Cal. Rptr. 355, 362 (1967).

¹²¹ CAL. GOV'T CODE § 820.4 (West 1966).

not be used in a police officer's defense in a case based on his use of unreasonable force. The police officer's only defense, therefore, is that he exercised reasonable force.

FEDERAL PROVISIONS—A GUIDING LIGHT

Generally

As has been noted numerous times above, the existing state remedies against a police officer for his use of unreasonable force appear to be generally inadequate and ineffective as a means to control police brutality.¹²² However, some federal provisions tend to supplement a victim's inadequate state remedies. Normally, an officer's official activities are privileged and will not form the basis of a federal suit against him. But, if an officer's actions deprive a person of a constitutional right, they are not privileged, notwithstanding state law to the contrary.¹²³ In some cases police brutality works a deprivation of a constitutional right. Congress is empowered to enforce the provisions of the Constitution against those who act under authority of state law in such a way as to deprive one of his constitutional rights.¹²⁴ To this end Congress enacted the Federal Civil Rights Act which provides for both criminal and civil actions against one who, acting under color of law, deprives a person of his rights, privileges, or immunities under the Constitution.¹²⁵ The civil and criminal provisions of the act are in *pari materia*, meaning that they are designed to protect the same rights.¹²⁶

The Civil Rights Act creates a cause of action to remedy the deprivation of constitutional rights. It is directed against persons who act under color of law. As such, the Act does not impose

¹²² See text accompanying notes 31-51, 86-104 & 114-21 *supra*.

¹²³ *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945).

¹²⁴ *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

¹²⁵ The relevant sections are 18 U.S.C. § 242 (1959) and 42 U.S.C. § 1983 (1959).

18 U.S.C. § 242 provides: "Whoever, under color of any law, statute, ordinance, regulation or custom willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined not more than one thousand dollars or imprisoned not more than one year, or both; and if death results, shall be subject to imprisonment for any term of years or for life."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

¹²⁶ *Picking v. Pennsylvania R.R.*, 151 F.2d 240, 248 (3d Cir. 1945).

liability on states, municipal corporations, cities and police departments because they are not considered to be "persons" within the meaning of the Act.¹²⁷

To find a person guilty of a violation of 18 U.S.C. section 242, imposing criminal liability, it must be shown that he acted under authority of law to willfully subject an inhabitant of the United States to a deprivation of rights protected by the Constitution.¹²⁸ The elements required to impose liability under 42 U.S.C. section 1983 vary from the above because this section imposes civil liability. To prevail under this section the plaintiff must show that the defendant's conduct took place under color of state law and that it subjected the plaintiff to a deprivation of a constitutional right.¹²⁹

The leading case in this matter is *Screws v. United States*,¹³⁰ which held that if an official is vested with the authority to deal with a given situation, then any action on his part is action "under color of law."¹³¹ This case involved a shocking episode of police activity. Petitioners, Screws and a deputy, arrested Hall pursuant to a warrant. While Hall was handcuffed petitioners beat him with their fists and a solid bar. The Court found that the petitioners were, despite an obvious abuse of their authority, acting under color of law at the time of the assault.¹³² Making an arrest, then, is action taken "under color of any statute" or "under color of any law."¹³³

In *Screws* the officers were authorized to make the arrest and to take steps necessary to effect it.¹³⁴ The Court found that the use of excessive force to effect the arrest was the petitioners' only unauthorized act. But, the Court went on to say, unauthorized acts can be acts taken "under color of law" in situations like the instant

¹²⁷ *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Municipal corporations and cities are not persons); *Burmeister v. N.Y. Police Dept.*, 275 F. Supp. 690 (S.D.N.Y. 1967) (Police department is not a person); *Williford v. California*, 352 F.2d 474, 476 (9th Cir. 1965) (State is not a person).

¹²⁸ *United States v. Jackson*, 235 F.2d 925, 927 (8th Cir. 1956).

¹²⁹ *Marshall v. Sawyer*, 301 F.2d 639, 646 (9th Cir. 1962).

¹³⁰ 325 U.S. 91 (1945).

¹³¹ *Id.* at 107.

¹³² "They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty . . . to make the arrest effective. Hence, their conduct comes within the statute." *Id.* at 107-08.

¹³³ Federal courts are vested with the power and responsibility to define the phrases "under color of any law" and "under color of any statute." *Marshall v. Sawyer*, 301 F.2d 639, 646 (9th Cir. 1962). Because of the *pari materia* nature of the two sections under discussion, the phrase "under color of any statute," as used in 42 U.S.C. § 1983, is construed the same as the phrase "under color of any law" as used in 18 U.S.C. § 242. *Picking v. Pennsylvania R.R.*, 151 F.2d 240, 248 (3d Cir. 1945), citing *Screws v. United States*, 325 U.S. 91 (1945).

¹³⁴ 325 U.S. at 111.

case.¹³⁵ One can see that acts "under color of any law" may include, but are not necessarily limited to, acts that are taken "under authority of any law." Hence, a misuse of power vested in a person by virtue of state law and "made possible only because the wrongdoer is clothed with the authority of state law" is action taken "under state law."¹³⁶

Because of the "color of law" provisions of 18 U.S.C. section 242 and 42 U.S.C. section 1983 most cases under these sections involve governmental employees or officers. While many states employ various doctrines of civil immunity,¹³⁷ such state immunity does not extend to cases arising under the Federal Civil Rights Act.¹³⁸ To insure uniformity, the matter of immunity from liability under federal law is left to the federal courts.¹³⁹ Clearly, from the wording of the statutes under discussion, the federal law provides no immunity to a person who, acting under color of state law, deprives another of a constitutional right.¹⁴⁰

Under 18 U.S.C. section 242 one must show that the officer acted willfully to deprive a person of a constitutional right.¹⁴¹ A "willful act," as used in a criminal statute, means an act done with a bad purpose.¹⁴² The bad purpose behind an act may be established by an inference based on the person's malice, the weapons used in the assault, the character and duration of the assault and the provocation, if any.¹⁴³ In the *Screws* case the Court inferred the existence of a bad purpose from the petitioners' use of excessive force and attached criminal liability thereto.¹⁴⁴

A willful beating, per se, is not a deprivation of a constitutional right. To work a deprivation of a constitutional right, the beating must be given with the purpose of depriving the victim of a con-

¹³⁵ "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If . . . the statute was designed to embrace only action which the state authorized, the words 'under color of any law' were hardly apt words to express the idea." *Id.*

¹³⁶ *United States v. Classic*, 313 U.S. 299, 326 (1940).

¹³⁷ This immunity has not been abrogated by the Federal Civil Rights Act. *Selico v. Jackson*, 201 F. Supp. 475, 478 (S.D. Cal. 1962).

¹³⁸ *Morgan v. Null*, 117 F. Supp. 11, 12 (S.D.N.Y. 1953).

¹³⁹ *See Morgan v. Null*, 117 F. Supp. 11 (S.D.N.Y. 1953).

¹⁴⁰ *See note 125 supra*. In fact, an action for damages under 42 U.S.C. § 1983 is a proper action for awarding exemplary or punitive damages. *Cf. Hague v. CIO*, 101 F.2d 774, 789 (3d Cir. 1939), *opinion modified*, 307 U.S. 496 (1939). However, if the state defends in a suit brought under federal law, the question remains as to whether or not the federal courts will apply state law under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹⁴¹ *Screws v. United States*, 325 U.S. 91, 101 (1945).

¹⁴² *United States v. Murdock*, 290 U.S. 389, 394 (1933).

¹⁴³ *Screws v. United States*, 325 U.S. 91, 107 (1945).

¹⁴⁴ *Id.* at 107.

stitutional right.¹⁴⁵ The aforementioned is required only in an action under 18 U.S.C. section 242.¹⁴⁶ If one acts willfully in defiance of an announced rule of law, the purpose to deprive is present.¹⁴⁷ The defendant need not know the law that he has violated. To this end it has been said that "[h]e who defies a decision interpreting the Constitution knows exactly what he is doing."¹⁴⁸ From the above it appears that a police officer need only have acted willfully to incur liability under this section, because the purpose to deprive a person of a constitutional right is inferred from a willful defiance of the law.

The Rights of Prisoners

The rights of a prisoner are given special consideration under federal law. He remains under the protection of both the due process clause and the Federal Civil Rights Act.¹⁴⁹ The Civil Rights Act protects "any citizen of the United States or other person within the jurisdiction thereof."¹⁵⁰ Because a prisoner is a person within the jurisdiction of the United States he can assert a claim under 42 U.S.C. section 1983¹⁵¹ or file complaint under 18 U.S.C. section 242.¹⁵² This is true notwithstanding any state imposed civil death statutes.¹⁵³ Hence, in the federal courts, as opposed to the California courts, a prisoner can seek redress for civil wrongs at the time they occur. He does not have to wait until the end of his imprisonment to have justice done on his behalf. Of course the prisoner may, in a proper case use the writ of habeas corpus if he chooses.¹⁵⁴

¹⁴⁵ Pullen v. United States, 164 F.2d 756, 759 (5th Cir. 1947).

¹⁴⁶ In an action under 42 U.S.C. § 1983 one need prove only that the "[C]onduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution" Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962).

¹⁴⁷ "When they [violators of the Constitution] act willfully . . . they act in open defiance or reckless disregard of a constitutional requirement which has been made specific and definite." Screws v. United States, 325 U.S. 91, 105 (1945).

¹⁴⁸ *Id.* at 104-05.

¹⁴⁹ Cooper v. Pate, 378 U.S. 546 (1963) (per curiam); United States v. Jackson, 235 F.2d 925 (8th Cir. 1956).

¹⁵⁰ 42 U.S.C. § 1983 (1959).

¹⁵¹ McCollum v. Mayfield, 130 F. Supp. 112, 116 (N.D. Cal. 1955); Siegel v. Ragen, 88 F. Supp. 996, 999 (N.D. Ill. 1949).

¹⁵² "Any such complaint should be sent to the United States District Attorney." Dixon v. Maryland, 261 F. Supp. 746, 748 (D. Md. 1966).

¹⁵³ McCollum v. Mayfield, 130 F. Supp. 112 (D.C. Cal. 1955).

¹⁵⁴ 28 U.S.C. § 2255 (1959). "In habeas corpus proceedings, the district judge is not limited to a simple remand or discharge of the prisoner, but he may dispose of the party as law and justice requires. Even if it be established beyond question that the alleged mistreatment of the prisoner existed and continued until the present time, the right of society to be protected from convicted criminals may well demand that,

Furthermore, a prisoner has the right to be protected from lawless violence while in the custody of a United States marshal. This right is protected by 42 U.S.C. section 1983.¹⁵⁵ Also, there is substantial authority to the effect that an infliction of cruel and unusual punishment is a violation of a prisoner's due process rights and a denial of equal protection of the laws.¹⁵⁶ So, as one can see, a prisoner can assert more rights in the federal courts; that is, he has the right to be protected by the laws, as well as access to the courts to insure that protection. Unfortunately, however, the federal courts have shown a judicial disinclination to intervene in matters of internal discipline in state prisons.¹⁵⁷

CONCLUSION

Police misconduct, when it occurs, is oftentimes the use of coercive force against members of the community. The community cannot, in good conscience, let its police mistreat it. Apparently, the remedies presently available are not adequate to control police brutality. Consequently, the citizens must depend upon the police to discipline themselves and control their use of unreasonable force. The efficacy of this system has been doubted:¹⁵⁸ Witness the recent increase in interest in the concept of police review boards.

Federal law provides certain guidelines that are not now used

even so, the petitioner be remanded to the state authorities with the direction that the petitioner's rights be respected." *Threatt v. North Carolina*, 221 F. Supp. 858, 860 (W.D.N.C. 1963).

¹⁵⁵ *Logan v. United States*, 144 U.S. 263 (1892).

¹⁵⁶ *In re Riddle*, 57 Cal. 2d 848, 855, 372 P.2d 304, 305, 22 Cal. Rptr. 472, 473 (1962), and cases cited therein.

¹⁵⁷ "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory discretion of the federal courts." *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1953). "The acts of prison officials . . . should be upheld if reasonably necessary to effectuate the purposes of imprisonment." *Kelly v. Dowd, Warden*, 140 F.2d 81, 91 (7th Cir. 1944). *See, United States v. Ragen, Warden*, 237 F.2d 953 (7th Cir. 1956).

¹⁵⁸ "[W]hen it is observed that a considerable group of plainclothesmen and higher police officials become directly involved in or tolerate those official crimes, the magnitude of the total problem can be viewed only as profoundly serious. Moreover, the evidence indicates that there has been little sustained effort to control it. Indeed, the methods of disciplining police misconduct that are ordinarily employed appear to be intrinsically futile." P. TAPPAN, *supra* note 2, at 308.

"The attitude of supervising officers who might put an abrupt halt to this private punishment remains as complaisant [*sic*] as it was twenty-five years ago." E. CRAY, *supra* note 5, at 142.

Furthermore, it should be noted that no matter how effective internal discipline might be, the citizen is not directly benefitted by it because it is "not designed to provide the aggrieved citizen with any measure of redress." *Id.* at 201.

in California. Perhaps these should be looked into and considered as a means to control police brutality. Because courts are, in most instances, the sole form of redress available to the citizen, they must take a more active role in the area of police brutality. Hopefully the recent increase in interest in certain police activities evidenced by the courts, particularly in search and seizure problems, will rub off in the area of police brutality.

It is imperative that the courts become active in this area. America is nearing a very delicate balancing point between the legally oriented and the not so legally oriented factions of society. Adequate law enforcement is needed to stabilize this polarization before it pulls the country apart. But law enforcement is needed on both sides of the fence. And, only just law enforcement will serve this country. The limits of lawful enforcement must be set in accordance with today's values. The courts must play an active part in this revision as they are one of a small number of bodies that can do so lawfully. Inaction on the courts' part in this matter could tip the scales the wrong way.

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